recommend that the Commission not adopt such a standard -- unless it is clearly defined -- since it could lead to unnecessary disputes as to who is a "billable" customer.[5]

6. Definition of a "Multichannel Video Programming Distributor"

The Cable Act defines a multichannel video programming distributor as a "person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." Section 2(c)(12), 1992 Cable Act. Congress intended this definition to encompass any stand-alone, multichannel distribution service that actually competes with a cable system.

---

[5] If by use of the term "billable," however, the Commission is only trying to determine how to measure the number of households in a multi-unit dwelling in which a landlord pays a bulk rate for cable service, then Local Governments are not opposed to such a limited use of the term -- subject to certain restrictions. The households in such a dwelling should be counted separately only if the landlord permits such households to choose a competitive service. If the landlord prohibits such choice, then only the landlord, and not the individual apartments in the dwelling unit, should be counted as a household since the households in the unit are prohibited from being "offered" the competitive programming service.

Congress did not intend the definition to include programmers that may lease multiple channels from a cable system and offer cable subscribers programming over that cable system. Nor did Congress intend for the definition to include a PEG access programmer.[6] Such a programmer is not in any sense a competitor to the cable operator since its service area, access to subscribers, and actual existence, are dependent on the cable system. Moreover, such a programmer is not an alternative independent source of competition since subscribers must purchase the programmer's programming through the cable system and, as a result, would have to buy the cable system's basic service tier and any regulated equipment as a condition of receiving the package of programming offered by the programmer. See Section 623(b)(7)(A). In addition, in the case of PEG access programmers, the payments for all (or substantially all) of such services go to the cable operator and not to the programmer.

C. Regulation of Basic Service Rates

---

[6] Local Governments believe that, if appropriately regulated, the different packagers of programming on a video dialtone system may be considered different multichannel video programming distributors so long as, among other things, the programming pipeline is regulated in such a way that there are no tie-in packages a subscriber must first purchase to receive a desired package, and that the video dialtone service provider is subject to appropriate franchise requirements and regulations.

1. Regulation by Local Governments and the Commission of Basic Service Rates

a. The Commission and Franchising Authorities Share Responsibility for Regulating Basic Service Rates.

Local Governments disagree with the Commission's conclusion that, under Section 623(a)(2)(A), it has "the power to regulate basic cable service rates only if we have disallowed or revoked the franchise authority's certification." NPRM at ¶ 15. The only interpretation of Section 623 that is consistent with what at first glance appears to be inconsistent statutory language in Sections 623(a)(2)(A) and (b)(1) is that Congress granted the Commission authority to regulate basic cable rates, except where a franchising authority is certified to regulate basic cable rates. Such an interpretation also is consistent with Congress' desire that the Commission and franchising authorities share responsibility for regulating rates.

Section 623(b)(1) states that "the Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable." Section 623(b)(1) (emphasis added). Nothing in Section 623 prohibits the Commission from regulating basic rates. The only other relevant language is that which limits the scope of the Commission's authority to regulate rates in situations where a franchising authority seeks to regulate such

rates. Section 623(a)(6). Section 623(a)(6) simply protects the right of franchising authorities that choose to regulate rates from having such regulatory authority permanently usurped by the Commission as a result of the Commission's revoking or disapproving a franchising authority's certification, or otherwise seeking to displace local regulation. Hence, in such circumstances, Congress, in an effort to protect such a jurisdiction, states that the Commission may exercise rate regulatory authority only until such time that the franchising authority is certified or recertified.

An interpretation of Section 623 that the Commission does not have the authority to regulate basic rates would be contrary to the public interest and would render Section 623(b)(1) meaningless -- a result that must be avoided if Sections 623(b)(1) and 623(a)(2)(A) can be reconciled. See Citizens to Save Spencer County v. EPA, 600 F.2d 844, 871 (D.C. Cir. 1979) (regulatory agency reconciling inconsistent provisions must pursue a "middle course that vitiates neither provision but implements to the fullest extent possible the directives of each"). The Commission should not interpret Section 623(b)(1) to be meaningless in light of the fact that the House and Senate conferees added the provision to the 1992 Cable Act at Conference Committee. Clearly, the Conferees added the language for some purpose, and

the only reasonable reading of that purpose is that the "Commission shall . . . ensure that the rates for the basic service tier are reasonable." Section 623(b)(1) (emphasis added).

Given Congress' intent to protect subscribers from unreasonable rates, the Commission, at a minimum, must exercise its authority to regulate basic rates in franchise areas where a franchising authority may not have the resources to regulate rates, but requests the Commission to regulate rates the franchising authority believes are not reasonable. Such regulation would clearly be consistent with both Sections 623(a)(6)(A) and (b)(1), and in the public interest. Section 623(a)(6)(A) requires that the Commission regulate rates in any circumstance where a certification does not meet the standards in Section 623(a)(3). Regulation pursuant to this subsection should not turn on whether a franchising authority filed a certification that the Commission disapproved or revoked, or whether the franchising authority requested the Commission to regulate rates.[7]

---

[7] The structure of Section 623(a) makes it clear that Congress intended for the Commission to regulate rates for any franchising authority that did not meet the certification requirement, but nonetheless sought to protect consumers from unreasonable basic cable rates. Congress did not put any time limit on how long the Commission must regulate rates pursuant to

[Footnote continued on next page]

A finding by the Commission that it is not obligated to regulate rates except in the limited circumstance where it disapproves of, or revokes, a franchising authority's certification would seriously undermine Congress' intention that Section 623 protect subscribers from the monopolistic pricing practices of cable operators throughout the nation. One of the major purposes of the 1992 Cable Act is to "ensure that consumer interests are protected in receipt of cable service" where a cable system is not subject to effective competition. Section 2(b)(4), 1992 Cable Act. The legislative history and congressional policy demonstrate that Congress did not intend for cable operators to continue to exploit cable subscribers in franchise areas that lack the resources to regulate cable rates. Therefore, this Commission should interpret Section 623 to require it to step in and ensure that basic rates are reasonable in areas where the local franchise authority is not capable of

---

[Footnote continued from previous page]
Section 623(a)(6); the Commission is obligated to regulate rates unless a franchising authority later decides to file a certification that meets the certification requirements and the Commission approves such certification. The subsection does not limit the length of time in which a franchising authority must seek certification; it only limits the length of time the Commission has to act if a certification request is filed.

regulating basic service rates, and believes that such rates may not be reasonable.[8]

b. The Absence of Effective Competition Should Be Presumed for Certification Purposes.

Local Governments disagree with the Commission's proposal to place the burden on a franchising authority to demonstrate that a cable operator is not subject to effective competition as part of its certification. NPRM at 17. It is particularly unfair to require a franchising authority to make such a finding since it may not have data necessary to make such a finding. For example, franchising authorities do not regulate DBS, MMDS, SMATV and other so-called "wireless cable systems," and, thus, do not have access to information regarding the extent such systems compete with a cable operator. Although such wireless cable systems may operate pursuant to a local business license, such license requirements may simply impose a fee and not permit franchising authorities to impose necessary reporting requirements on such operators. Moreover, such operators would challenge the right of local governments to impose such regulations, given federal

---

[8] Rate regulation in such franchise areas should not impose undue administrative burdens if the Commission imposes a benchmark, rather than a cost-of-service, method of regulating basic service rates -- as recommended below.

restrictions on their right to regulate such operators to the same extent as cable operators. See, e.g., New York State Comm'n on Cable Television v. FCC, 749 F.2d 804 (1984).

Local Governments believe that effective competition should be presumed in a franchise area,[9] given that Congress presumed that the vast majority of cable operators are not subject to effective competition. For example, Congress found that "most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition." Section 2(a)(2), 1992 Cable Act (emphasis added).

Hence, the certification form should reflect such a presumption and not impose any burden on a local government to demonstrate a cable system is not subject to effective competition. To reflect this presumption,

---

[9] Local Governments agree with the Commission's conclusion that the test for the presence or absence of effective competition should be based on a franchise-area basis for cable systems serving multiple franchise areas, and that the effective competition standard must be applied to each cable operator operating in a franchise area. NPRM at ¶ 18. Local Governments believe that this finding must be based on a franchise-area basis even when the Commission is regulating rates pursuant to Section 623(c). The statutory definition of effective competition itself makes clear that effective competition is to be measured in a "franchise area," and includes no exception for cable systems serving multiple franchise areas. See Section 623(l)(1).

Local Governments believe that Question 6 on the proposed certification form at Appendix D should include the statutory definition of effective competition and only require a franchising authority to respond to the following question: "The Commission presumes that your franchise area is not subject to effective competition. Based solely on the effective competition definition, do you have any reason to believe this presumption is wrong in your franchise area? If so, state why."

The burden should be on a cable operator to overcome the congressional presumption that it is not subject to effective competition. Such a burden is fair given that a cable operator has data demonstrating its penetration rate, the number of households it serves, and other data relevant to determining whether effective competition is available, and may have an incentive by doing the research necessary to show it is not subject to effective competition. Moreover, the Commission's current regulations place the burden on cable operators of demonstrating they are subject to effective competition. See 47 C.F.R. § 76.33(a)(1) (cable systems subject to regulation remain subject to regulation pending a demonstration that they may not be regulated). The cable operator should have the right to supplement information in its possession with information collected from the Commission from so-called wireless cable

operators that may compete with the cable operator in a franchise area.[10]

A franchising authority should cease regulating rates pursuant to Section 623(b) only if the cable operator demonstrates by a preponderance of evidence that it is subject to effective competition.

A cable operator has a right to appeal a finding by the franchising authority that it is not subject to effective competition pursuant to a revocation petition. The cable operator should be required to provide the franchising authority notice of such petition and any supporting documentation. The franchising authority

---

[10] The Commission seeks comment on whether multichannel video programming distributors who are competitors to cable systems should be required to disclose the number of their subscribers and any other data relevant to a finding of effective competition. NPRM at ¶ 17 n.35. Local Governments believe that such information must be collected in order to assist the Commission and franchising authorities in determining whether a cable operator is subject to effective competition. Local Governments believe that the Commission should bear the burden of collecting such information since it, rather than a franchising authority, exercises regulatory authority over MMDS, SMATV and other so-called wireless cable operators. Many such distributors operate pursuant to licenses granted by the Commission. Moreover, the 1992 Cable Act requires the Commission to collect EEO information from such operators on a yearly basis. See Section 22, 1992 Cable Act. Given this regulatory oversight, the Commission should bear the burden of collecting such information from wireless operators and should require them to submit information on a yearly basis -- possibly at the same time such operators must submit EEO reports -- for each franchise area in which they provide multichannel video programming service.

should have a period to respond pursuant to the Commission's revocation regulations (described below) and to submit any additional documentation it believes will assist the Commission in reviewing the petition. The Commission should uphold the franchising authority's finding regarding effective competition so long as such finding is not "arbitrary and capricious" -- the judicial review standard often applied to review of local administrative decisions. A franchising authority's right to regulate rates should continue during the appeal process and should not cease until a final finding by the Commission or -- if the franchising authority appeals -- by a court that the franchise area is subject to effective competition.

c. Filing of Certification

Local Governments agree with the Commission's conclusion that the standardized and simple certification form located at Appendix D of the NPRM should be used for certifying franchising authorities, subject to the modifications to Question (6) proposed above. Local Governments offer the following comments on issues raised in the NPRM regarding the filing of the form:

(i) A Franchising Authority's Legal Authority to Regulate Rates May Be Based on Federal, State or Local Law.

The Commission seeks comments on what basis must a franchising authority must certify on the certification form that it has the legal authority to regulate basic rates, as required by Section 623(a)(3)(B). NPRM at ¶ 20. Specifically, the Commission asks whether a franchising authority derives its power to regulate rates from state or local law, a franchise agreement or the Cable Act, and whether franchising authorities and the Commission may regulate rates in states that may prohibit cable rate regulation.

Although a franchise agreement or state law may be the source of a franchising authority's power to regulate rates, such sources need not be the basis of a franchising authority's legal right to regulate rates. Congress made clear that the absence of rate regulation provisions in a franchise agreement is not a bar to a franchising authority's right to regulate rates: "The Commission shall not establish as a condition of certification that the franchise agreement between a franchising authority and cable operator include a provision allowing the franchising authority to regulate the cable operator's rates." House Report at 81. Moreover, Local Governments believe that Section 623 preempts state laws that prohibit rate regulation of cable systems. Section 623 represents a comprehensive

effort by Congress to regulate cable rates and demonstrates a clear intent to preempt incompatible state laws, thus making unnecessary "'an express congressional statement to that effect.'" New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983) (holding that federal law pre-empted New Mexico's law regarding on-reservation hunting and fishing) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980)).[11]

Many franchising authorities have the power to regulate rates independent of an explicit state law or franchise provision providing for such regulation. For example, many municipalities operate pursuant to home

---

[11] However, Congress did not intend to totally prohibit state and local regulations governing cable rates, which is demonstrated by the fact that Section 623 expressly provides for local rate regulation in areas not subject to effective competition. Given that Congress intended for the Commission and franchising authorities to share the responsibility for regulating basic service rates, the Commission should not preempt state and local rate laws that do not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Based on this principle, the Commission should not preempt state and local rate regulations unless they substantially interfere with compliance with the regulations the Commission promulgates pursuant to Section 623. A local regulation should not be considered to substantially interfere with the Commission's rules unless it is irreconcilable with the Commission's rules. Compare Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (preemption where "compliance with both federal and state regulations is a physical impossibility . . . ."), reh'g denied, 374 U.S. 858 (1963).

rule charters. Such charters grant municipalities much discretion in managing their own affairs. See Eugene McQuillan, The Law of Municipal Corporations § 9.07 (3d ed. 1988). Courts have upheld the right of municipalities to regulate cable systems on the basis of "their wide latitude in the regulation of local economies." Manor Vail Condominium Ass'n v. Town of Vail, 604 P.2d 1168, 1171 (Colo. 1980) (upholding constitutionality of franchise ordinances governing rates to be charged for cable television service). Franchising authorities may also derive their power to regulate cable systems and, thus, cable rates through their police powers,[12] or through state statutes granting franchising authorities the right to control their streets and rights-of-way.[13] In addition, Section 623(a)(2)(A) provides franchising authorities an independent source of power to regulate rates.[14]

---

[12] See, e.g., City of Liberal v. Telepromter Cable Serv., Inc., 544 P.2d 330, 333 (Kan. 1975) (holding that municipality had authority to regulate rates pursuant to its police power).

[13] See, e.g., Illinois Broadcasting Co. v. City of Decatur, 238 N.E.2d 261, 264 (Ill. App. Ct. 1968) (City's power to enfranchise cable company originated from statutory grant permitting municipalities to regulate the use of their streets, alleys and public ways).

[14] Compare Lawrence County v. Lead-Deadwood School District No. 40-1, 469 U.S. 256 (1985) ("Because the language and legislative history of the federal statute

[Footnote continued on next page]

A franchising authority should be able to rely on any of the sources of its authority to regulate a cable operator -- only some of which are discussed above -- as the basis for certifying that it has the legal authority to regulate rates.[15]

(ii) The Commission's Regulations Should Permit, But Not Require, Communities Jointly To Regulate Basic Service Rates.

Local Governments agree that the 1992 Cable Act's legislative history contemplates that two or more communities served by the same cable system may file a

---

[Footnote continued from previous page]
indicate that Congress intended local governments to have more discretion in spending federal aid than the State would allow them, we hold that the state statute [limiting the ability of local governments to spend such funds] is invalid under the Supremacy Clause); Schloss v. City of Indianapolis, 528 N.E.2d 1143, 1148-49 (Ind. Ct. App. 1988), vacated on other grounds, 553 N.E.2d 1204 (Ind. 1990) (state statute which limited franchise fees to a fee reasonably related to administrative costs was preempted to the extent it prohibited franchising authorities from assessing franchise fees of up to five percent of a cable operator's yearly revenues, as allowed under the Cable Act).

[15] The Commission also seeks comment on which authority within a state or local government may exercise rate regulatory authority. NPRM at ¶ 20. The Commission should not attempt to define who has authority to regulate rates. State and local law identify the appropriate cable rate regulatory authority. The Commission simply should require that any person filing a certification state that he is duly authorized to file the certification on behalf of the franchising authority, and that such authority is the appropriate authority in the State and franchise area to regulate rates. The Commission should presume the reliability of such certification.

joint certification and exercise joint regulatory jurisdiction. NPRM at ¶ 21. Congress noted that it did not intend for Section 623 "to be interpreted to prohibit two or more communities served by the same cable system from jointly filing a written certification to the Commission and from jointly exercising regulatory authority pursuant to such certification." House Report at 80. Hence, Local Governments believe that the Commission's certification rules should allow communities that wish to jointly regulate a cable system that serves such communities.

However, Local Governments strongly oppose any requirement that such communities jointly regulate a cable system as a condition of certification. Section 623 does not support such a requirement, and the legislative history to the 1992 Cable Act demonstrates that Congress did not intend for the Commission to impose such a requirement. Congress stated that the subsection "is not intended to prohibit such joint regulatory authority, nor should it be interpreted to require such joint regulatory authority." House Report at 80-81.

d. Approval of Certification

Local Governments agree with the Commission that Section 623 requires that a certification submitted by a franchising authority shall be effective 30 days after

it is filed, unless the Commission takes action within the 30-day period denying certification.[16]

NPRM at ¶ 22. Based on this statutory requirement, Local Governments agree with the Commission that Congress did not intend that the Commission establish a pleading cycle with opportunity for interested parties, including a cable operator, to comment during the 30-day period. Therefore, the Commission may base its decision on whether to grant certification solely on the filing by the franchising authority.

Local Governments oppose any requirement that a franchising authority notify a cable operator that it is certified within 10 days of the Commission's decision. Given our proposal that a franchising authority provide a cable operator notice that it has filed certification and the Commission's proposal that certification be automatic absent an adverse finding by the Commission, a franchising authority should not be required to provide any further notice to the cable operator. If the Commission imposes a 10-day notice requirement, however, a franchising authority's failure to comply with the

---

[16] Local Governments agree with the Commission's conclusion that it must assume regulation of basic service rates in a franchise area where certification is denied. Such regulation is required by Section 623(a)(6).

requirement should not be the basis for a revocation or other petition pursuant to Section 623(a)(5).

e. Revocation of Certification

To reduce the administrative burdens on franchising authorities of complying with the Commission's regulations, the Commission should grant Local Governments flexibility to design their own procedures and processes for reviewing basic cable rates. All such local procedures and processes should be upheld against attack by a cable operator or other interested party pursuant to Section 623(a)(5) so long as they: (a) are consistent with any time limitations imposed by the Commission for the review of a rate; (b) ensure that interested parties have the opportunity to comment; and (c) do not result in rate decisions inconsistent with the Commission's regulations.[17] Such flexibility should guide the Commission's determination of when revocation or other remedies are appropriate under Section 623(a)(5). What follows are suggestions to how the Commission should structure its revocation regulations:

---

[17] However, the Commission might structure a set of procedures that franchising authorities might voluntarily adopt -- which would be particularly useful in franchise areas that might not have in place procedures for reviewing a rate increase -- and which the Commission would follow in circumstances where it regulates the rates for basic cable service.

(i) Revocation Is Appropriate Only Where Franchising Authority's Regulations are Substantially Inconsistent With The Commission's Rates Regulations.

Local Governments agree that the Commission might revoke a franchising authority's certification when noncompliance involves a violation of Section 623(a)(3)(A). Revocation may also be appropriate if the Commission finds that a franchising authority lacks the legal authority to regulate rates (e.g., cable operator is subject to effective competition). However, Local Governments agree with the Commission that lesser remedies are appropriate where the noncompliance involves "Section 623(a)(3)(B) or (C), i.e., where local and state laws may be facially consistent with [the Commission's] regulations, but the authority has applied them inconsistently or has otherwise departed from the terms of its certification." NPRM at ¶ 26. The Commission should not revoke a franchising authority's certification, nor impose any other remedy, absent a finding that such authority's regulations stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Such a finding should not be made unless local regulations substantially interfere with compliance with the Commission's regulations. Local regulations should

be found to substantially interfere with the Commission's rules only where they are irreconcilable with the Commission's rules.

(ii) Franchising Authorities Should Have Notice and Opportunity To Respond To Complaints, and An Opportunity To Cure Any Violation of Section 623(a)(3).

Local Governments agree with the Commission's proposal that a petitioner for revocation or other relief against a franchising authority should serve a copy of its petition on the franchising authority, as required by statute. NPRM at ¶ 27. The petition should contain a statement that such service was made and about the manner in which it was made.

However, Local Governments oppose the Commission's suggestion that a franchising authority must respond to such a petition within 15 days. NPRM at ¶ 27. Such a time frame may be administratively impossible in jurisdictions that, for example, require city or county council approval before a reply is made. The 15-day period may elapse before such council is scheduled to convene, or before any other administrative review processes to which a franchising authority may be subject are completed.[18] The Commission is required to

[18] For the same reasons, Local Governments oppose the period of seven to ten days proposed in ¶ 28 of the NPRM for parties to respond to a petition by a cable operator
[Footnote continued on next page]

reduce the administrative burdens on franchising authorities, not to increase them, in structuring its regulations. It would be a needless burden on municipalities to require them to schedule emergency city or county council meetings, or totally revamp administrative review processes, to comply with the suggested 15-day time period.

Local Governments suggest that a reasonable time period for a franchising authority to respond to a revocation petition is 90 days after receipt of such petition. This should be a sufficient period for most franchising authorities to respond in compliance with any local administrative rules. Local Governments believe that the Commission should grant franchising authorities additional time, if necessary, to complete a response.

[Footnote continued from previous page]
stating that it is subject to effective competition. It is next to impossible for a franchising authority, once it receives a petition from a cable operator, to review the petition, provide public notice of such petition, to solicit opposition, and to obtain public comment, all within a seven to ten day period. In addition to the practical difficulties, it may be inconsistent with a franchising authority's administrative procedures to move so swiftly. Local Governments believe that such petitions should be subject to the same pleading cycle as that proposed below for review of a cable operator's rates: 120 days for initial review, which would include the filing of oppositions and public comments, with an additional 90 days to make a decision if additional information is necessary.

A cable operator or other interested party filing a petition with the Commission should be required to show by a preponderance of evidence that a franchising authority's regulations are substantially inconsistent with the Commission's regulations. If the Commission finds that a franchising authority has violated any subpart of Section 623(a)(3), the Commission should inform the franchising authority of such violation and give the franchising authority a reasonable period of time to suggest how it might cure such violation. If the Commission approves the suggested remedy, then the franchising authority simply should be required to certify that it will comply with the remedy approved by the Commission. This procedure should be sufficient to cure noncompliance by a franchising authority; Local Governments oppose reporting requirements, temporary suspensions of certifications, or any other remedies to cure noncompliance.

f. Assumption of Jurisdiction by the FCC

Local Governments believe that a franchising authority should have the right to regulate rates during the pendency of a petition for revocation filed by a cable operator or other interested party. Otherwise, a cable operator (or others) might try to delay the rate protections Section 623 provides consumers by filing meritless petitions with the Commission. The

Commission's rules must be structured in a way which removes such incentives.

As argued above, Local Governments also believe the Commission should grant franchising authorities maximum flexibility to establish their own rules governing the review of cable rates. The Commission may wish to follow local regulations in exercising jurisdiction in franchise areas where certification has been revoked. However, Local Governments are not opposed to the Commission imposing on itself different regulations governing its own exercise of rate authority in such jurisdictions, provided such regulations do not also apply to individual franchising authorities.

2. Regulations Governing Basic Rates

a. Basic Service Rates Should Be Set at Rates Comparable to Those in Competitive Markets.

Local Governments agree that Congress intended for the Commission's regulations to "embody a standard of reasonableness for basic tier rates that reflects a reasonable balancing" of the factors listed in Section 623(b)(2)(C). NPRM at ¶ 31. However, Local Governments believe that the requirement in Section 623(b)(1) -- that the Commission adopt regulations which ensure that the rates subscribers pay are no higher than they would pay if a cable system were subject to effective competition -- is a separate

requirement. The Commission cannot simply balance this requirement along with the other factors it should consider in establishing its regulations. Instead, its balancing of other factors should be with the purpose of "achiev[ing] the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition." Section 623(b)(1) (emphasis added).

b. The Commission Should Adopt a "Benchmark" Model of Rate Regulation.

Local Governments agree with the Commission's conclusion that it should adopt a benchmark, rather than a cost-of-service, model of rate regulation.[19] NPRM at ¶ 33. The use of a benchmark approach is mandated by the 1992 Cable Act's requirement that the Commission craft rules which reduce burdens on

---

[19] Local Governments also agree that, after a benchmark rate is established, the Commission might use a price cap-type formula to limit the amount of increases above the benchmark. To ensure that the price cap is fair to consumers, it must be based on a regional services price index, rather than a national index, given that the inflation rate in jurisdictions may vary.

Moreover, to limit the administrative burdens on franchising authorities and the Commission in reviewing rate increases, Local Governments believe the benchmark should be adjusted once every three years, rather than on a yearly basis.

franchising authorities, consumers, the Commission and cable operators, while taking into account the factors in Section 623(b)(2)(C). Congress plainly did not intend for the Commission to adopt common carrier-type cost-of-service regulation. See House Report at 83.

The benchmark model chosen by the Commission should be consistent with the intention of Congress that the Commission's regulations ensure that cable subscribers are charged a "reasonable" rate for basic cable service, and that such rates not reflect the monopoly rents currently charged by cable operators in non-competitive markets. See, e.g., Sections 2(a)(1) and (2) and Section 2(b)(5) of the 1992 Cable Act, and Section 623(b)(1).

Local Governments believe that a benchmark model based on rates charged by cable systems subject to effective competition would best achieve Congress' statutory goals. First, since it is based on competitive cable systems, such a benchmark would meet the primary congressional directive to ensure that subscribers in areas not subject to effective competition pay "reasonable" rates that are no higher than those paid by subscribers in areas subject to effective competition -- thus eliminating the monopoly rents of cable operators. Second, the benchmark would accomplish the secondary congressional directive of